

Mr. Surel S. Shah i/b. Mr. N. K. Mudnaney for Petitioners.
Mr. R. V. Govilkar a/w. Mr. Mihir R. Govilkar and Ms Shabana Salmani i/b.
Mr. Abdul Latif N. Khatri for Respondents No.1(a) to 1(d).

P.C. :

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 03.11.2014 passed by the learned Judge, City Civil Court, Mumbai in Chamber Summons No.1930 of 2014 in S.C.Suit No.8031 of 1984. By that order, the learned trial Judge allowed the Chamber Summons taken out by respondents No.1(a) to 1(d), hereinafter referred to as 'plaintiffs', seeking permission to delete the land bearing Survey No.88/8-17-18 corresponding to C.T.S.No.400, 400/1 to 7 and 485 of Village Nahur, Mumbai Suburban District from the list of the suit property given in exhibit-A to the plaint and consequential amendments in the body of the plaint.

3. In support of this Petition, Mr. Shah submitted that plaintiffs have instituted S.C.Suit No.8031 of 1984 in the City Civil Court at Bombay inter alia praying for declaration that the suit lands more particularly described in Exhibit-A are Sutidari Occupancy lands; that plaintiff

Jaywant Jagannath Patil is the sole, exclusive owner / occupant of the suit lands and has been in peaceful and uninterrupted possession, enjoyment and vahivat thereof, since the time of his predecessors in title among other prayers.

4. Mr. Shah submitted that petitioners herein have instituted Suit No.1212 of 1991 on the Original Side of this Court, which after transfer to City Civil Court, Bombay is numbered as Suit No.9984 of 1991. Petitioners have instituted Suit inter alia praying for declaration, partition by metes and bounds of the properties described in exhibit-E. In exhibit-E, Part-II, Survey No.88 is at Sr.No.24. He submitted that during the pendency of the Suit filed by plaintiffs, petitioners took out Chamber Summons No.383 of 2011 for impleading them as defendants. The learned trial Judge dismissed that Chamber Summons on 03.08.2013. Aggrieved by that decision, petitioners herein instituted Writ Petition No.8668 of 2013. By order dated 12.03.2014, this Court allowed the Petition thereby allowing Chamber Summons impleading petitioners as defendants in Suit No.8031 of 1984. Aggrieved by that decision, plaintiffs instituted S.L.P. before the Apex Court. On 09.05.2014, Apex Court directed that in the meantime, no amendment shall be carried out in the plaint and the said S.L.P. is pending in the Apex Court and the interim order continued. In other words, petitioners herein are not impleaded as defendants in Suit No.8031 of 1984.

5. Mr. Shah submitted that while allowing the Chamber Summons filed by the plaintiffs, the learned trial Judge has observed in paragraph 4 that plaintiffs desire to delete Survey No.88/8-17-18 from the list of the suit property because of lack of suitable evidence to lay their claim over the suit land. He submitted that as Survey No.88, being the larger property, is the subject matter of the Suit for partition instituted by the

petitioners, being Suit No.9984 of 1991, the said observation will come in the way of the plaintiffs therein and the co-owners relying upon this observation will contend that plaintiffs being co-sharers have no evidence.

6. He further relied upon Order XXIII to contend that where the plaintiff abandons Suit or part of claim under sub-rule (1) without permission referred to in sub-rule (3), he is precluded from instituting fresh Suit in respect of the subject matter of such suit or such part of the claim. He further submitted that sub-rule (5) thereof lays down that nothing in this Rule authorizes the Court to permit one of the several plaintiffs to abandon a Suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any Suit or part of a claim, **without the consent of the other plaintiffs**. Relying upon Rule 1-A of Order XXIII, Mr. Shah submitted that where a Suit is withdrawn or abandoned by the plaintiff under Rule 1 and the defendant applies to transpose as a plaintiff under Rule 10 of Order I, the Court while considering this application shall have due regard to the question whether the applicant has substantial question to be decided as against any of the other defendants. He submitted that though the petitioners herein, by virtue of order passed by this Court dated 12.03.2014 in Writ Petition No.8668 of 2013 are impleaded as defendants, they can always apply for transposing them as plaintiffs. In such contingency, without the consent of the petitioners, being plaintiffs, plaintiffs herein cannot either abandon a Suit or part of a claim under sub-Rule (1) or withdraw under sub-rule (3).

7. While considering application of a defendant for transposing him as a plaintiff under Order XXIII, Rule 1-A, the Court will also have regard to the question whether such applicant has a substantial question

to be decided as against any of the other defendants. Mr. Shah submitted that the observations made in paragraph 4 of the impugned order will certainly come in his way in the event of petitioners herein succeeding before the Apex Court and they are impleaded as defendants.

8. Mr. Shah also invited my attention to the submission recorded by this Court in paragraph 6 of the order dated 12.03.2014 in Writ Petition No.8668 of 2013. In paragraph 6, submission of the plaintiffs herein to the following effect was recorded:

6. ... In so far as the Survey No.88 is concerned, it is the case of the Plaintiffs in the 1984 that Survey No.88 which is the subject matter of the Suit of the 1991, is a different property than the parts of the Survey No.88 are the subject matter of the 1984 Suit, namely Gat No.88/8-17-18 corresponding C.T.S.No.400, 400/1 to 7, 485. ...”

9. For all these reasons, he submitted that Petition requires consideration and the impugned order deserves to be set aside.

10. On the other hand, Mr. Govilkar supported the impugned order. He submitted that plaintiffs have taken out Chamber Summons for deleting land bearing Survey No.88/8-17-18 corresponding to C.T.S.No.400, 400/1 to 7 and 485 of Village Nahur, Mumbai Suburban District from the list of the suit property given in exhibit-A to the plaint and consequential amendments in the body of the plaint, unconditionally. In other words, plaintiffs do not desire to make any claim in respect of the said property in future. He further states that in Suit No.9984 of 1991, petitioners herein have prayed for partition by metes and bounds of the properties and one of the properties is Survey No.88 in Part II of exhibit-E. Survey No.88, being a larger property, includes Survey No.88/8-17-18 corresponding to C.T.S.No.400, 400/1 to 7 and 485 of Village Nahur, Mumbai Suburban District. In other words, even if the plaintiffs herein have abandoned their claim qua this

property, petitioners' interest is protected as claim in respect of the property which is sought to be abandoned by the plaintiffs forms part of exhibit-E in Suit No.9984 of 1991, subject to petitioners establishing their claim that they are entitled to partition of Survey No.88.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, petitioners herein took out Chamber Summons No.383 of 2011 in S.C.Suit No.8031 of 1984 for impleading them as defendants. The learned trial Judge rejected that Chamber Summons and this Court has allowed the Chamber Summons. It is no doubt true that aggrieved by this decision, plaintiffs have preferred S.L.P. before the Apex Court and the said proceedings are pending and that Apex Court has directed that in the meantime, no amendment shall be carried out in the plaint. In other words, as of today, petitioners herein are not joined as defendants in S.C.Suit No.8031 of 1984. Thus as of date, reliance placed by Mr. Shah on Order XXIII does not advance case of the petitioners. Even if I proceed on the footing that ultimately petitioners herein succeed before the Apex Court and the order passed by this Court is upheld thereby they are impleaded as defendants in S.C.Suit No.8031 of 1984, merely because plaintiffs have abandoned their claim in that Suit, will not cause any prejudice to the petitioners in as much as in Suit No.9984 of 1991, the property which is sought to be abandoned by the plaintiffs herein is included for partition by metes and bounds. In my opinion, the interest of the petitioners herein is sufficiently protected as the said property also forms part of entire Survey No.88. In view thereof, no case is made out for interference with the impugned order. Hence, Petition fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)